NOTICE:

THE FOLLOWING MOTION TO FILE AN AMICUS BRIEF OUT-OF-TIME WAS DENIED BY THE COURT ON OCTOBER 31, 1983 (52 LW 3342), BUT IS REPRODUCED HEREIN IN THE INTEREST OF COMPLETENESS.

OCT 24 1983

NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOSE CORPORATION, INC.,
Petitioner,

vs.

CONSUMERS UNION OF THE UNITED STATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT CONSUMERS UNION

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MOTION OF MARIE SHIBUYA-SNELL, DIRECTOR OF THE DEPARTMENT OF CONSUMER AFFAIRS OF THE STATE OF CALIFORNIA, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Marie Shibuya-Snell, Director of the California Department of Consumer Affairs, requests permission to file the attached brief as an amicus curiae pursuant to Rule 36.

In her capacity as Director of the California Department of Consumer Affairs, Marie Shibuya-Snell has an empiricist's understanding of the value of publications like Consumer Reports magazine. The Department of Consumer Affairs received 101,000 complaints about products and services from consumers in 1982 alone.

Modern products and services are complex and advertised to induce the public to buy. Consumers cannot effectively separate the glitter from the gold in

advertising. Who among us can evaluate for ourselves a product as common and as simple, by today's standards, as a transistor radio or a home computer?

Consumer Reports, a specialty magazine, is a relatively unique resource for the perplexed ponderer of radio wiring and other electronic mysteries. A great many other publishers, as well as most broadcasters, also devote portions of their communication with the public to what may be termed consumer reporting and they, too, benefit the public.

In addition, the focus of consumer purchasing power disciplines and benefits the economic process which we refer to as the market. The millions of individual consumer choices made daily are many tiny rivulets of information which "trickle up" to help shape the larger economic world. More than most economies of the world, ours is both informed by consumers and supported financially by consumers; variety in the sources of available information about goods

and services is a condition precedent to intelligent consumer choice in the market and the efficient operation of our economy.

Consumers, more importantly, are constitutionally entitled to a variety of sources of information. There is an overlay of the marketplace of ideas upon that of goods and services. A ruling against Consumer's Union in this case will deter the publication of information in contravention of the first amendment and check the free flow of information at its source.

The people's constitutional right to an unfettered and fearlessly informative press militates against adopting the position asserted by Bose Corporation, Inc., in this case and more than justifies the judicial resources expended to assure that the first amendment continues to play a meaningful role in our society.

The respondent, Consumer's Union, has consented to the filing of this brief supporting its position. The petitioner, Bose Corporation, Inc., has withheld consent

to the filing of this brief. With respect to the late filing of this brief, Amicus Curiae begs the Court's indulgence and acknowledges that this brief is not timely. Amicus Curiae hopes that the Court will nonetheless accept the attached brief for filing because of the importance of the issue and the arguments not made by others which are asserted, e.g., that governmental action which has a special and inhibiting effect on the press runs afoul of the first amendment and cannot be approved by this Court. Cf. Minneapolis Star and Tribune v. Minn. Com'r of Rev., __ U.S. __, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983).

Marie Shibuya-Snell, as Director of the California Department of Consumer Affairs, has a clear statutory mandate to represent the interests of California's approximately 24 million consumers. See California Business and Professions Code sections 301, 310, 320 and 321. In view of the foregoing, the Director requests permission to file the attached brief

arguing the particular interest of consumers in received information, the significance of the procedural rules at issue in assuring that publishers and broadcasters maintain a continuing flow of information to consumers, and the decisions of this Court which the Director respectfully contends must control the outcome in this case.

Dated: October ___, 1983.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	7
I. PRELIMINARY STATEMENT	7
II. THE FIRST AMENDMENT INSURES COMMUNICATION	9
III. REQUIRING PROOF OF ACTUAL MALICE IN THIS CASE ASSURES COMMUNICATION ABOUT THE ECONOMY AND GENERATES A MORE EFFICIENT ALLOCATION OF SOCIAL AND ECONOMIC RESOURCES	14
IV. THE INDEPENDENT REVIEW OF THE EVIDENCE RULE AND THE CLEAR AND CONVINCING EVIDENCE STANDARD ARE BUT APPLICATIONS OF THE GENERAL PRINCIPLE THAT GOVERNMENT ACTION WHICH IMPINGES UPON RIGHTS AND LIBERTIES SECURED BY THE FIRST AMENDMENT MUST BE SUBJECT TO AN EXACTING AND RIGOROUS OR STRICT JUDICIAL REVIEW	17
V. THIS COURT SHOULD NOT CARVE OUT A SMALL GROUP OF PUBLISHERS FOR SPECIAL TREATMENT AND SEGMENT THE MEDIA BY PROVIDING A LOWER LEVEL OF CONSTITUTIONAL PROTECTION IN PRODUCT DISPARAGEMENT CASES	30
VI. CONCLUSION	34

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

First Amendment of the United States Constitution . . . 1-5, 8, 9, 17-22, 25, 31, 34, 35

Seventh Amendment of the United States Constitution 3

Fourteenth Amendment of the United States Constitution 22

CASES

Bose v. Consumers Union of U.S., Inc., 508 F.Supp. 1249 (D. Mass. 1981) 12, 27

Bose Corporation v. Consumers Union of United States, Inc., 692 F.2d 189 (1st Cir. 1982) cert. granted U.S. No. 82-1246 27

Brandenburg v. Ohio, 395 U.S. 444 (1969) 22

Bridges v. California, 314 U.S. 252 (1941) 4, 30

Cantwell v. Connecticut, 310 U.S. 296 (1940) 18

Citizens Against Rent Control v. Berkeley, California, 454 U.S. 290 (1981) 18

Consolidated Edison Company of New York, Inc., v. Public Service Commission of New York, 447 U.S. 530 (1980) 8

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 14

Edwards v. South Carolina, 372 U.S. 229 (1963) 26

F&J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F.Supp. 292 (N.D. Ohio 1974) 12, 13

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) . . . 4, 11

Fiske v. Kansas, 274 U.S. 380 (1927) 22-26, 30

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 8, 15

Greenbelt Cooperative Publishing Co. v. Bresler, 398 U.S. 6 (1970) . . 20

Inwood Laboratories, Inc. v. Ives, 456 U.S. 844 (1982) 28, 29

Minneapolis Star and Tribune v. Minnesota Com'r of Rev., ___U.S. __, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) 5, 30-32

NAACP v. Claiborne Hardware, __ U.S. __, 73 L.Ed.2d 1215 (1982) 22

New York Times v. Sullivan, 376 U.S. 254 (1964) 2, 3, 5, 8, 14, 15, 17-21, 25, 28, 31, 32, 34

Sterling v. Constanin, 287 U.S. 378 (1932) 3

Thornhill v. Alabama, 310 U.S. 88 (1940) 11

United Medical Laboratories, Inc. v. Columbia Broadcasting, Inc., 404 F.2d 706 (9th Cir. 1968) cert. denied 394 U.S. 921 (1969) 12, 13

Virginia Board of Pharmacy v. Virginia Citizen's Advisory Council, 425 U.S. 748 (1976) 10, 11

STATUTES

28 U.S.C. section 2072 4

Kansas Criminal Syndicalism Act . . 22, 23

Ohio Criminal Syndicalism Act 22

RULES

Federal Rule of Civil Procedure 52(a) 4, 8, 28, 29, 33

OTHER SOURCES

"How Libel Suit Sapped The Crusading Spirit Of A Small Newspaper," The Wall Street Journal, September 29, 1983 . . 33

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is fully set forth in the foregoing Motion for Leave to File Brief as Amicus Curiae.

SUMMARY OF ARGUMENT

This case is about the first amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

Freedom of speech and press are priceless rights. This case highlights the importance of those rights to the people as consumers of goods, services and information. It specifically highlights the essential

role of a constitutionally mandated special scope of review which permits a reviewing court to be certain that fact finders have given deference to the constitutional prohibition with respect to those rights.

Without that bulwark against the social, economic, and political forces which, at various points in our history, have inclined us to make and enforce laws which abridge our freedom to speak, to publish, and to be informed, our society would long ago have lost something that the drafters of the first ten amendments believed was so integral to the working of the national system which they had fought to establish. Perhaps that is why they put that prohibition first.

The first amendment was woven into the law of libel in New York Times v. Sullivan, 376 U.S. 254 (1964). The actual malice standard is now an established part of our libel law. The constitutionally mandated broader and stricter scope of review is also an established part of our first amendment

jurisprudence. Both are intended to and do preserve communication.

The constitutionally based scope of review has a substantial history. 1/ More recently, the rule has been applied in first amendment and other constitutional cases where the resolution of the constitutional issue turns on findings of fact. See, e.g., New York Times v. Sullivan, supra, at 284, 285, and cases cited.

This special review is essential because some constitutional violations can only be discerned by first answering questions about what the facts are and whether the fact finder has given the constitution its due. The constitutionally based scope of review at issue herein has been upheld against attacks grounded in the seventh amendment. New York Times v. Sullivan, Id. at 285, n. 26. The rule is no less important when the fact finder is a

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1/ See, e.g., Sterling v. Constantin, 287 U.S. 378 (1932) and cases cited at 398.

judge. In the often emotionally charged environment in which cases of this kind arise, even judges can lose perspective. See, e.g., Bridges v. California, 314 U.S. 252, 271-275 (1941), in which first amendment freedoms were held infringed when a newspaper and labor organizer were adjudged in, and fined for, contempt of court for publishing their rather different views regarding a litigated labor dispute while the case proceeded in the court.

The Federal Rules of Civil Procedure are promulgated by this Court and adopted by Congress. 2/ Many states have procedural rules similar to Rule 52(a). 3/ The only rule for appellate review of constitutional (or unconstitutional) fact finding which can effectively guide a reviewing court in

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2/ 28 U.S.C. section 2072.

3/ But this Court has always been the final arbiter of constitutional law and this Court has consistently held that "states do not have greater latitude than Congress to abridge freedom of speech." First National Bank of Boston v. Bellotti, 435 U.S. 765, 780, n. 16 (1978).

examining findings of fact which control the outcome in cases asserting first amendment and other constitutional violations is that reaffirmed by the Court in New York Times v. Sullivan, supra, and carried forward since.

Furthermore, the Court cannot and should not accord to defendants who are sued for product disparagement, rather than corporate or other defamation, a lower level of constitutional protection. Cf. Minneapolis Star and Tribune v. Minn. Com'r of Rev., __ U.S. __, 103 St.Ct. 1365, 75 L.Ed.2d 295 (1983).

Efficiency in judicial administration is a very important value. However, those who invented the underpinnings of the American dream were not primarily concerned, in 1791, with efficiency; nor can we be in 1983. There is a higher law, that of the first amendment of the United States Constitution.

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ARGUMENT

I

PRELIMINARY STATEMENT

The Court's decision in this case will affect the continuing validity of rules which accord to the people the rights to be free to hear, to read and to inform themselves. The Court's decision could threaten the special significance to consumers of mass communicators such as publishers and broadcasters who are the *sine qua non* of communication regarding nearly all matters for all consumers of information.

Is there some meaningful distinction between libel laws (relating to persons) and product disparagement laws (relating to

products and services) when the frame of reference is free speech and press? Cases like Consolidated Edison Company of New York, Inc., v. Public Service Commission of New York, 447 U.S. 530 (1980), New York Times v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), read together, argue forcefully against such a distinction.

The specific question certified by this Court is whether the court of appeals should have been bound by Federal Rule of Civil Procedure 52(a) in reviewing the trial court's record in this case. The arguments to follow further elucidate the important reasons why the answer to that question must be a thorough affirmation of our continuing commitment to the first amendment of the United States Constitution.

II

THE FIRST AMENDMENT INSURES COMMUNICATION

The first amendment guarantees the highly valued but still fragile exchange of thoughts, images, ideas, and information by which persons and organizations of every ilk communicate with each other and the public.

Consumer Reports, an established citizen of the world of communication, is published by a non-profit union of consumers. By providing third party views on products and services offered to the public, this magazine performs a role which is important to consumers, to the marketplace and, ultimately, to our society as a whole.

Consumer reporting, like all our myriad and marvelous expressive activities, is not only a fragile form of communication. It is also an often controversial form of communication. Such communication

is usually welcomed by consumers; manufacturers, suppliers and retailers have been less cordial when their products and services have been criticized. It is nonetheless well established that the constitution protects such communication.

This Court has had occasion, in a variety of cases, to stress the constitutional protection afforded the interests of those who want to receive communication. See, e.g., Virginia Board of Pharmacy v. Virginia Citizens Advisory Council, 425 U.S. 748, 756, 757 (1976) and cases cited therein. As Justice Blackmun observed (in resolving the question of whether consumers had standing to enjoin enforcement of statutes which prevented the publication of prescription drug prices by pharmacists):

> "... the protection afforded is to the communication, to its source and recipients both. This is clear from the decided cases." Id. at 756.

Speech, quite literally, does not exist without the listener's ear. The role of the

press (both print and electronic) is a function of its readers, listeners, and viewers.

More specifically, it is well established that the people, as consumers (Id. at 764-766) and as interested and intelligent participants in our society (Id. at 762-764), are constitutionally entitled to a free flow of information about matters economic, both large and small. See Thornhill v. Alabama, 310 U.S. 88, 101-105 (1940) and First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978), in which the importance to our society of a widely and well informed public is emphasized.

Businesses sometimes object to consumer reporting and commentary, particularly when the commentary does not accord with the image of the product or service that the business has sought to fix in the public eye through advertising and other promotional activities. Regrettably, such objections can be and often are expressed in the form of ultimately unmeritorious but very

expensive defamation lawsuits; publications like Consumer Reports can be easily driven out of print.

Without publications like Consumer Reports, the consuming public would lose the ability to evaluate products and services in a relatively painless way by reading reports by third parties which can supplement a personal examination and the supplier's advertising.

Furthermore, as the district court in this case cautions:

> "The public's interest in obtaining information of this type is perhaps even greater than the corresponding interest in personal defamation actions, the interest in obtaining information about other people. Information obtained from product commentators often relates to health and safety problems in consumer products. See, e.g., United Medical Laboratories, Inc. v. Columbia Broadcasting Systems, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969); F&J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F.Supp. 292 (N.D. Ohio 1974)." Bose v. Consumers Union of United States, Inc., 508 F.Supp. 1249, 1271 (D. Mass. 1981).

The United Medical Laboratories, Inc. case related to allegedly inaccurate tests performed by a mail order medical laboratory; F&J Enterprises, Inc. was litigated because of reporting about an allegedly unsafe toy for children. It cannot be disputed that consumers receive informational benefits from publications like Consumer Reports, from other publishers, and from media broadcasters which will become inaccessible if mass communicators must periodically run a gantlet of high powered litigation lawyers armed with word processors, unlimited budgets, unlimited imagination, and a great deal of time.

III

REQUIRING PROOF OF ACTUAL MALICE IN THIS CASE ASSURES COMMUNICATION ABOUT THE ECONOMY AND GENERATES A MORE EFFICIENT ALLOCATION OF SOCIAL AND ECONOMIC RESOURCES

In enacting legislation which provides for recovery of damages in our courts for product disparagement, the state and federal governments stand between those who can provide information about products and services and those who need information.

A concern for the chilling of the press (because differences of opinion are too often transmuted and take the form of defamation lawsuits) prompted the addition of the element of actual malice to defamation causes of action filed by public officials, public figures, and limited purpose public figures against publishers, broadcasters and all other speakers. See New York Times v. Sullivan, 376 U.S. 254 (1964), Curtis Publishing Co. v. Butts, 388

U.S. 130 (1967) and Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 352 (1974).

Without becoming unduly ensnared in a lengthy discussion of the facts in this case, it is worth noting that, after 12 years of litigation, the dispute centers, finally, on a slip of a preposition, a distinction between Consumer Reports' expressed impression that sound heard from the petitioner's audio speakers wandered "about the room" (or "around the room"), rather than "along the wall". 4/ One wonders if this is the stuff of actual malice. If this is an example of known falsity of the facts, or reckless disregard for the true facts (New York Times v. Sullivan, supra at 280, Gertz v. Robert Welch, Inc., supra, at 328), then this case presents the stuff of a publisher's nightmare and, no doubt, a defamation

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4/ Doubtless, one tenth of the money spent by Petitioners on this litigation would have financed an exquisite advertising campaign for the stereo components at issue herein.

lawyer's dream. In that event, consumers may anticipate a dangerous hush in the marketplace of ideas about these and, perhaps, other matters.

Without both the actual malice standard, and the strict scrutiny standard of review, with the corollaries of independent review of the evidence for clear and convincing evidence of actual malice, a variety of salutary mechanisms are at risk. Marketplace commentary and consumer reporting assure that a consumer can, in some instances, prevent economic and personal injury before it occurs.

Furthermore, consumers who seek information from as many sources as are available before purchasing are less likely to resort to the courts to obtain compensation for losses resulting from products and services. The reduced likelihood of litigation and the more efficient allocation of social, as well as economic, resources are benefits which cannot be lightly cast aside.

IV

THE INDEPENDENT REVIEW OF THE EVIDENCE RULE AND THE CLEAR AND CONVINCING EVIDENCE STANDARD ARE BUT APPLICATIONS OF THE GENERAL PRINCIPLE THAT GOVERNMENT ACTION WHICH IMPINGES UPON RIGHTS AND LIBERTIES SECURED BY THE FIRST AMENDMENT MUST BE SUBJECT TO AN EXACTING AND RIGOROUS OR STRICT JUDICIAL REVIEW

This Court has always scrutinized with care both legislative and judicial determinations which threaten liberties and rights secured by the first amendment. 5/ This Court has recently restated its commitment to the function of the first amendment as a bulwark "protecting a marketplace for the clash of different

5/ This has been the case particularly when the restraint or regulation is specifically directed to the content of speech. New York Times v. Sullivan, supra, at pages 269-270. Indeed, defamation laws and the enforcement of such laws are content based both by their terms, insofar as they seek to regulate defamation, and as applied, insofar as disputes about other matters are transported into the courtroom in the guise of defamation litigation.

views and conflicting ideas." Citizens Against Rent Control v. Berkeley, California, 454 U.S. 290 (1981). In that case, Chief Justice Burger wrote for the Court as follows:

> "Long ago this court admonished that with respect to the First Amendment, 'the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). This was but another way of saying that regulation of First Amendment rights is always subject to exacting judicial review." Id., at 294.

In New York Times v. Sullivan, supra, Justice Brennan introduced a discussion of the legal issues in that case as follows:

> "We may dispose at the outset of two grounds asserted to insulate the Alabama courts from constitutional scrutiny." Id., at 265 (emphasis added).

The Court then proceeded to analyze the two primary legal barriers erected by the plaintiff in that case to the constitutional arguments of the defendant, and concluded that absent proof of knowledge of the falsity of or reckless disregard for

the true facts, the Alabama libel laws were unconstitutional as applied. Id. at 283.

Since the Court had not ruled that Alabama's defamation legislation was unconstitutional on its face (regardless of how applied), the Court stated the law with respect to the level of scrutiny necessary to assure that finders of fact applying the New York Times v. Sullivan rule not stray from the constitutional line (proof of actual malice) drawn by the Court. Justice Brennan stated the principle as follows:

> "Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This court's duty is not limited to the elaboration of constitutional principles; we must also in such cases review the evidence to make certain that those principles have been constitutionally applied...." Id. at 284, 285 (emphasis added).

There are excellent reasons for a more searching study of governmental action which affects the exercise of first amendment rights and liberties, whether that action is

the adoption of a statute which is unconstitutional on its face, or an application by the courts of an otherwise constitutional law in an unconstitutional way.

First amendment issues sometimes arise in politicized and emotionally charged environments. The question of racial integration in the South was the backdrop for the civil libel litigation which culminated in the New York Times v. Sullivan decision. A dispute about land use planning set the stage for litigation which led to the decision in Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

Questions about product quality are often very politically charged today. There are long periods of time during which questions about safety may be scientifically unresolved and subject to dispute. Often, members of the public would not knowingly choose to take the risks associated with such products, while the firms that produce

the products have, in some instances, been more sanguine about safety than a disinterested third party might be.

Whenever the media raise questions about the safety of any particular product, it is increasingly likely that someone will sue, no matter how careful the reporting, and perhaps even if the litigation is groundless. Such disputes are fertile ground in which the seeds of disagreement and anger can germinate and bear that usually bitter and expensive fruit, defamation litigation.

For many reasons, the record must be carefully examined in each and every case in which action by any branch of government has placed first amendment rights in jeopardy.

The cases cited by the Court in New York Times v. Sullivan, supra, at 285, as well as those which have followed it, demonstrate a wide variety of contexts in which the ability of an appellate court to engage in an independent review of the evidence has played a role in preserving

freedom of speech and press. The most recent restatement of this constitutional principle, and its application to preserve our first amendment freedoms, appears in NAACP v. Claiborne Hardware, __ U.S. __, 73 L.Ed.2d 1215, 1238 n. 50, and 1245-1246 (1982).

Older cases demonstrate the role of the constitutional rules as well. Fiske v. Kansas, 274 U.S. 380 (1927), for example, demonstrates the tale a "cold" record can tell. Fiske v. Kansas would be decided today on first amendment grounds. (See Brandenberg v. Ohio, 395 U.S. 444 (1969), in which the Court held, per curiam, that the Ohio Criminal Syndicalism Act could not be enforced against a peaceful gathering of the Ku Klux Klan; the Court held the statute unconstitutional both on its face and as applied.)

In 1927, in Fiske v. Kansas, supra, the fourteenth amendment liberty interest provided the basis for reversal of the Kansas courts' enforcement of the Kansas

Criminal Syndicalism Act. 6/ The criminal charges filed against Mr. Fiske reproduced, verbatim, quotations from pamphlets he was handing out and alleged that Mr. Fiske had violated the act by attempting to persuade people to join a labor union which was a branch of the Industrial Workers of the World. The written material that he was giving people included unpopular rhetoric about the relationship of labor and capital but no advocacy of violence.

At the trial, the state offered only the written material and Mr. Fiske's own testimony which was reviewed by the Court. Id., at 383. Neither the written material nor Mr. Fiske's testimony established that Mr. Fiske had engaged in advocacy which would have violated Kansas law. There was no other evidence put forth with respect to Mr. Fiske's advocacy.

6/ The Kansas Criminal Syndicalism Act provided penalties for the expression of doctrines which advocated violence and destruction of property to effect political change.

The jury nonetheless found, beyond a reasonable doubt, that Mr. Fiske was guilty and should go to jail for what he had said. The Supreme Court of Kansas, reading the record as a whole, upheld the verdict on the ground that since the language of the written material and the testimony of Mr. Fiske were open to interpretation, the jury could choose not to believe Mr. Fiske's testimony. Thus, the Kansas Supreme Court held:

> "'There was room for them to find as their verdict shows they did, that the equivocal language of the preamble, and of the defendant in explaining it to his prospects was employed to convey and did convey the sinister meaning attributed to it by the state.'" Id., at 385.

Because the statute was a statute of general scope enforced in a particular situation over a timely objection that such enforcement was unconstitutional (i.e., because the statute was assertedly unconstitutional as applied), the United States Supreme Court restated the progenitor

of the rule at issue herein. Id., at 385, 386. 7/

When the United States Supreme Court analyzed the record of the Kansas trial, the Court reached quite a different conclusion. The Court held:

> "No substantial inference can, in our judgment, be drawn from the language of this preamble, that the organization taught, advocated or suggested the duty, necessity, propriety or expedience of crime, criminal syndicalism, sabotage or other unlawful acts or methods. ... And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, the 'sinister meaning attributed to it by the state.'" Id., at 386 (emphasis added).

The Court held that the statute was unconstitutional as applied because no crime had been charged or proven. Id., at 386, 387.

7/ The independent review of the evidence rule was historically invoked whenever any federal right was asserted in a state court proceeding. See supra, at 2, n. 1. The scope of the rule has since both narrowed (to include constitutional rights, and especially first amendment rights) and broadened (to include findings made in federal courts). New York Times v. Sullivan, supra, at 284, 285 and cases cited therein.

Since there was no direct evidence to support the Kansas jury's conclusion, one can speculate that the findings of fact in that case were the product of the jury's belief that anyone who believed in the ideas advocated by Mr. Fiske would also, of necessity, believe and advocate that those ideas should be made manifest through violent means even though the record did not support such a conclusion. In effect, the United States Supreme Court ruled that the uncorroborated inference (the product of the fact finder's disbelief of Mr. Fiske's testimony) could not support a judgment which impinged on constitutional rights.

Without an independent review of the evidence, permitting an appellate court to "make an independent examination of the whole record" (Edwards v. South Carolina, 372 U.S. 229, 235 (1963)), the Court, in Fiske and in many other cases, would have been unable to prevent both substantial injustice and an evisceration of the constitution.

In the case now before this Court, the difference between the trial court's ruling and that of the court of appeals turns, finally, on the inference which the trial court was willing to draw from the evidence in respect to actual malice, based on the fact finder's view of the testimony given by Mr. Seligson of Consumers Union. The court of appeals found that normal editorial procedures were followed and decided that:

> "The most we can conclude from this is that in reviewing the manuscript CU employees could have inquired more painstakingly into the precise langage being used." Bose Corporation v. Consumers Union of United States, Inc., 692 F.2d 189, 197 (1st Cir. 1982).

The trial court, on the other hand, decided that actual malice was established largely because:

> "Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as 'about' to mean anything other than its plain ordinary meaning." Bose Corporation v. Consumers Union of United States, Inc., 508 F.Supp. 1249, 1276, 1277 (D.Mass. 1981).

Thus, the ultimate finding of actual malice turns upon an inference about which the trial court and court of appeals differed with respect to the relative weight and meaning of the evidence about Consumer Report's editorial procedures and the state of mind of the person who wrote the article. 8/

In New York Times v. Sullivan, supra, at 285, 286, the Court ruled that a reviewing court can, should and must intrude on the province normally reserved for the finder of fact in order to assure that finders of fact do not, as the trial court did in the case at bar, accord too little weight to constitutional considerations. Rule 52(a) cannot provide a sufficiently searching scope of review.

In Inwood Laboratories, Inc. v. Ives, 456 U.S. 844 (1982), a trademark infringement action in which constitutional consider-

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8/ Amicus Curiae also supports the respondent and other amici who argue that New York Times v. Sullivan, supra, and its progeny control the substantive outcome herein in that the court of appeals, by focusing on the editorial procedures as a whole, properly applied the governing principles of law.

ations were not a factor, Justice O'Connor, writing for the Court, identifies as follows the more limited role which a reviewing court can play pursuant to Rule 52(a):

> "Each of those conclusions is contrary to the findings of the District Court. An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' (Citation omitted)." Id., at 857, 858.

The Court in that case held that the court of appeals had erred in its application of Rule 52(a) by setting aside findings of fact that were not clearly erroneous. Id. at 858.

When the issue at stake is not a constitutional one, perhaps there is some margin for possible, but not clear, error. When the question is whether constitutional rights and liberties have been adequately protected, an appellate court cannot perform a role in assuring that protection if it cannot chart its course across the record,

with the constitutional rights to free speech and press as its lodestar, and (to recast the language of the Court in Inwood Laboratories, Inc.) consider whether to give the facts a different construction, resolve ambiguities differently, and find a more sinister cast, if such there is, to a fact finder's (government) action which has placed constitutional rights and liberties at risk even though that fact finder has deemed its own action innocent. See, e.g., Fiske v. Kansas, 274 U.S. 380 (1927) and discussion, supra, pp. 22 to 26; Bridges v. California, 314 U.S. 252 (1941).

V

THIS COURT SHOULD NOT CARVE OUT A SMALL GROUP OF PUBLISHERS FOR SPECIAL TREATMENT AND SEGMENT THE MEDIA BY PROVIDING A LOWER LEVEL OF CONSTITUTIONAL PROTECTION IN PRODUCT DISPARAGEMENT CASES

This Court recently held in Minneapolis Star and Tribune v. Minn. Com'r

of Rev., __ U.S. __, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) that the State of Minnesota's imposition of a special use tax on paper and ink could not be constitutionally upheld because the tax applied only to the press, and, therefore, could burden rights protected by the first amendment.

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Court stressed the fact that publishers and the media are the most vulnerable defendants in defamation actions because they serve as mass communicators. Justice Brennan wrote:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." Id. at 278.

The words are no less true today.

The tax in Minneapolis Star and Tribune was further unconstitutional on first amendment grounds because the statutory scheme creating the tax exempted from taxation the first $100,000 of paper and ink purchases. Many smaller publica-

tions did not pay the tax. Justice O'Connor wrote at 75 L.Ed.2d 295, 309:

> "The State explains this exemption as part of a policy favoring an 'equitable' tax system, although there are no comparable exemptions for small enterprises outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota could justify the scheme." (emphasis added.)

In Minneapolis Star and Tribune v. Minn. Com'r of Rev., the Court's concern was that the press could be taxed to death. In New York Times v. Sullivan, supra, the concern was that the press would be sued to death.

The risks identified by the Court in Minneapolis Star and Tribune and in New York Times v. Sullivan are identical insofar as the enforcement of tax laws, like the enforcement of the laws which establish and define a cause of action for defamation, has the potential of inhibiting free speech and press, thus preventing communication. The

practical result is today even more likely in the defamation litigation context than it is in the taxation context.

These risks are not hypothetical. More than one mass communicator has already withdrawn from aggressive investigative reporting as a result of the threat and actuality of such resource draining litigation. See "How Libel Suit Sapped The Crusading Spirit Of A Small Newspaper," The Wall Street Journal, September 29, 1983, at 1, col. 1.

If the Court rules that in a product disparagement case, unlike other defamation cases, Rule 52(a) can constitutionally control the scope of appellate review when the presence or absence of full constitutional protection turns upon a finding of fact, the proximate result will be even more litigation for the media and publishing communities. The ultimate effect will be publishers who publish less and too cautiously, some who disappear altogether, and some who choose not to publish at all.

VI

CONCLUSION

Consumer Reports is a self-help journal for consumers. It is published by a non-profit corporation which is financed by and composed of consumers. Consumer Reports performs a unique public service. Without the protection of the first amendment, this private provider of public service, and others, will be buried in the detritus of defamation lawsuits.

We ask this Court, the ultimate arbiter of constitutional law, to scrupulously avoid sacrificing "the effective administration of justice" (New York Times v. Sullivan, supra) for efficiency in the administration of justice.

The solicitude for the first amendment and its role in protecting unfettered communication that has been expressed in the

recent decisions of this Court exemplifies one of the important functions of the Court, that of assuring that the first amendment continues to serve as a foundation for the rights and liberties upon which our nation, our economy and our society have prospered.

The decision of the Court of Appeals for the First Circuit should be affirmed.

Dated: October ___, 1983.

Respectfully submitted,

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I, Eleanor Lusetti, being duly sworn, state:

All parties and amici appearing have been served with three copies each of attached Motion and Brief Amicus Curiae of Marie Shibuya-Snell, Director of the California Department of Consumer Affairs. Said service was accomplished by depositing said documents in a United States mailbox on October ___, 1983, with first-class postage prepaid, and addressed to the attorneys of record for said parties and amici as follows:

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